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No. 97-1638

# In the Supreme Court of the United States

October Term, 1997

David Rendel and Rachel Rendel
*Petitioners,*

*vs.*

United States of America

***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT***

## REPLY TO BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. WHETHER THE STATUTE OF LIMITATIONS ON COLLECTION IS REALLY A BAR TO COLLECTION BY THE IRS. THAT IS, WHETHER A TAXPAYER IS ENTITLED TO REFUND OF AN AMOUNT PAID TO THE IRS AFTER THE STATUTE OF LIMITATIONS ON COLLECTING THE AMOUNT PAID HAS EXPIRED.

II. WHETHER A TAXPAYER'S LIABILITY TO THE UNITED STATES AFTER AN ERRONEOUS REFUND IS A *TAX* LIABILITY?

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## REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT

1. The government states "In the present case, petitioners do not dispute that they owed the amount of taxes and interest that they paid and for which they now seek a refund." (Br. 4). This is a gross misstatement of fact. The Rendels have consistently maintained, throughout this litigation, that after the erroneous refund they no longer owed any ***tax***. Proper characterization of the Rendel's obligation to the United States, *viz*: tax or non-tax debt, is critical to the outcome of this case.

Although the Rendels may have been obligated to the United States after the erroneous refund, for the reasons discussed in our Petition, (Pet. 14-16), that obligation was not a ***tax*** debt. We will not repeat that argument here, other than to reiterate that, contrary

to the assertion of the government (Br 4), the Rendels vigorously dispute they owed a *tax* obligation after the IRS erroneously refunded their money.

Because the Rendels did not owe a *tax* liability, *Lewis v. Reynolds*, 284 U.S. 599 (1932) has no application, and *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 1 U.S.T.C. ¶218 (1927) provides the rule for decision. (See Pet. 9-14). Moreover, for this same reason, the statute of limitations on assessment of taxes (see Br. 5-6), has no bearing here. It simply does not matter that the statute of limitations remained open because there was no *tax* to assess. This is precisely the error the Ninth Circuit made.

The government's position, that this Petition should be denied because there is no conflict, is based on the contention that the Rendels owed a *tax* liability. Presumably the government agrees, as indeed they must, that if the Rendels did not owe a *tax* obligation the Ninth Circuit's decision conflicts as stated in our Petition.

2. The government also errs in contending that *Goldstein, Baron & Lewis, Chartered v. United States*, 995 F.2d 35 (4th Cir. 1993), cert. denied, 510 U.S. 1041 (1994) is "indistinguishible" from the present case. (Br. 6).

First, *Goldstein, Baron* is wholly inapposite. That case is based on the waiver theory, not IRS failure to follow statutory procedures. The Fourth Circuit specifically agreed that the IRS should be required to follow the established procedures for collecting erroneous refunds but found that the taxpayer's *written acknowledgment* of the *legitimate tax debt* owed to the IRS constituted a waiver of its right to object. 995 F.2d at 37.

Second, the IRS has disavowed the theory upon which the Fourth Circuit decided *Goldstein, Baron*. See *Singleton v. United States*, 128 F.3d 823, 833, note 9 (4th Cir. 1997) ("The govern-

ment has abandoned its waiver argument on which the district court based its opinion, believing the reasoning to be incorrect."). [1]

The government has not articulated any theory why reasoning that was incorrect in both *Goldstein, Baron* and *Singleton* has suddenly and magically become correct. It remains faulty reasoning, and ought not stand as a bar to this Petition.

Finally, even if waiver is theoretically applicable, no waiver is evident on the record of this case. There is no written acknowledgment by the Rendels that they owed a legitimate tax debt, nor is there any evidence that could support a finding of waiver. This is a significant distinguishing fact from *Goldstein, Baron*. The government's asserted waiver theory is an insufficient basis to warrant denial of this Petition. In this regard, we also note that this theory played no part whatsoever in the Ninth Circuit's decision.

## CONCLUSION

The government's sole argument against existence of a conflict between the Ninth Circuit's decision and opinions of this Court as well as among the circuit courts of appeals is its demonstrably incorrect assertion that the Rendels do not dispute they owed a *tax* liability after the erroneous refund. We have demonstrated that this

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[1] In its brief in *Singleton*, the government stated:

> The Government does not urge this Court to adopt the reasoning of the District Court in holding for the government, namely, that taxpayers acknowledged their debt to the IRS and waived their right to a refund. *We believe that reasoning is incorrect. See* I.R.C. § 6401(a); *Alexander v. United States*, 44 F.3d 328, 333 n. 6 (5th Cir. 1955); Rev. Rul. 74-580, 1974-1 C.B. 400.

*Singleton*, Brief of Appellee, p. 12, n. 4 (Emphasis added).

contention is wrong — the Rendels have maintained throughout this litigation that they did not owe any ***tax***.

As a result, this case presents questions of exceptional importance that are worthy of resolution by this Court, as set forth in our Petition. (Pet. 17-18).

Accordingly, the Rendels respectfully request that their petition for writ of certiorari be granted.

Respectfully Submitted,

David M. Kirsch
*Counsel for Petitioners*

Dated: June 17, 1998